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No. 92-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

DAVID T. JORDAN,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a jury's award of punitive damages in an amount fifty times greater than the compensatory damage award violate the defendant's right to due process of law where the award does not bear any understandable relationship to the compensatory damages awarded and (a) the jury was presented with evidence of the defendant's net worth prior to determining any question of liability, (b) the jury was allowed to base its award of punitive damages on findings it made from the preponderance of the evidence, and (c) the review of the award for excessiveness is governed by whether the award is the result of bias or prejudice?

2. Do Sections 4b and 4c of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 6b, 6c, preempt state law which would otherwise create a private cause of action to recover compensatory and punitive damages for conduct described in those statutory provisions, so as to render erroneous an award of punitive damages in an amount four times the maximum statutorily prescribed civil penalty for a violation of those statutory provisions?

3. Did the U.S. Court of Appeals for the Eighth Circuit fail to comply with this Court's directive in Case No. 88-1483 by refusing, on remand, to consider issues fairly included within the questions presented for review by Clayton Brokerage Co. of St. Louis, Inc.'s earlier petition in this case?

STATEMENT OF PARTIES

Plaintiff-Appellee in the proceeding below was David T. Jordan. Defendant-Appellant below was Clayton Brokerage Co. of St. Louis, Inc.[1] Martin Rachlin was a defendant in the proceeding below but was dismissed prior to trial.

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[1] Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Norfoods, Inc. Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Norfoods, Inc.

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No.

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit has rendered two opinions in this case. On October 17, 1988, that court rendered an opinion which has been officially reported at 861 F.2d 172 and unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 24,346. On September 18, 1992, after that opinion had been vacated by order of this Court, *Clayton Brokerage Co. Of*

St. Louis, Inc. v. Jordan, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991), the Court of Appeals rendered a second opinion which is officially reported at 975 F.2d 539 and unofficially reported at [1990-92 Binder] Comm. Fut. L. Rep. ¶ 25,382.

The orders of the United States District Court for the Western District of Missouri dated February 5, 1987 (denying Clayton's motion for a new trial, judgment notwithstanding the verdict, or remittitur) and October 10, 1991 (denying Clayton's post-remand motions to vacate the judgment and award of punitive damages) from which Clayton appealed to the Eighth Circuit Court of Appeals have not been officially or unofficially reported.

These opinions and orders, and the unreported order of the Court of Appeals dated June 10, 1991, are reproduced in reverse chronological order as Appendices A through E to this Petition.

JURISDICTION

The decision of the Court of Appeals was entered on September 18, 1992. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the following statutory and constitutional provisions involved in this petition for certiorari are reproduced at Appendix F to this petition:

(a) U.S. CONST. amend. XIV

(b) U.S. CONST. amend. V

(c) 7 U.S.C. § 6b

(d) 7 U.S.C. § 6c

(e) 7 U.S.C. § 18(a)

(f) 7 U.S.C. § 25

STATEMENT OF THE CASE

In 1989, Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") petitioned this Court to review a decision of the U.S. Court of Appeals for the Eighth Circuit affirming a punitive damage award of $400,000 — fifty times the amount of the compensatory damage award. *Clayton Brokerage Co. of St. Louis, Inc. v. David T. Jordan*, No. 88-1488 (filed March 9, 1989).

In addition to asking the Court to consider whether the punitive damage award was an excessive fine prohibited by the Eighth Amendment,[2] Clayton asked the Court to decide

> Whether an award of punitive damages against a defendant in a civil case is constitutionally permissible where the plaintiff has not been required to establish the wrongdoing and defendant's liability for such wrongdoing beyond a reasonable doubt, and liability has been determined based on the preponderance of the evidence?
>
> Whether, in a civil case in which punitive damages have been prayed for, a defendant's rights to equal protection under the law and due process are violated when the jury is presented with evidence of a verdict on the defendant's liability (a) for the tort alleged and (b) for punitive damages?
>
> Whether Sections 4b and 4c of the Commodity Exchange Act as amended, 7 U.S.C. §§ 6b, 6c preempt state law which would otherwise apply to the conduct described in

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[2]Clayton's argument under the Eighth Amendment was later foreclosed by this Court's decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

those statutory provisions, so as to render erroneous a judgment based on a claim arising under state law for conduct specifically governed by those statutory provisions?

Clayton's Petition was granted without reservation of issues. *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991). The Court of Appeals' decision was vacated, and the case was remanded to the Court of Appeals with instructions to reconsider the case in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

On remand, the Court of Appeals treated this Court's order as a directive only to reconsider the specific arguments Clayton had previously made in the Court of Appeals and to determine whether *Haslip* had explicitly validated them.[3] The court refused to consider Clayton's claim that Missouri law does not apply sufficient constraints on the jury's discretion in awarding punitive damages to comport with the requirements of due process — even though Clayton's argument was grounded on the due process objections Clayton had previously made to the standard of proof and introduction of evidence of Clayton's net worth. The court also refused to consider the question of preemption posed in Clayton's Petition.[4]

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[3] For example, the Court of Appeals rejected Clayton's argument that use of the preponderance of the evidence standard of proof violated Clayton's right to due process of law because this Court had rejected a similar argument in *Haslip*. App. A, at pg. A-3. The Court of Appeals ignored the fact that this Court only stated that a higher burden of proof is unnecessary when the award is buttressed by other procedures. *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. at 1046, n. 11, 113 L.Ed.2d at 23, n. 11. The Court of Appeals made no finding that sufficient buttressing procedures were followed in this case.

[4] The Court of Appeals gave two reasons for refusing to address the preemption issue: (a) the issue was not involved in the *Haslip* case; and (b) Clayton first raised the question in its petition in Case 88-1483. The record reflects that Clayton's Petition to this Court was the first written document

(Footnote 4 continued on next page)

The Court of Appeals effectively held that Missouri's standard for determining excessiveness — that "punitive damages must bear some relation to the injury inflicted, though they need not bear any relation to the actual damages allowed" — passed constitutional muster under the standard announced by this Court in *Haslip* — "[i]t ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." App. A at pg. 4-5, *citing Wheeler v. Community Federal Savings & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) and *quoting Haslip*, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.

(Footnote 4 continued)

filed in the course of the proceedings in this case in which Clayton explicitly labeled its defense as one based on preemption. The record is also clear, however, that the defense was raised and preserved in Clayton's Answer filed in the District Court.

There, Clayton pled that those counts of the complaint seeking recovery on common law theories of liability failed to state a claim upon which relief could be granted. That pleading conforms to the requirements of Rule 8(b), Fed. R. Civ. P., which requires defenses to be expressed in "short and plain terms." While Clayton did not use the word "preemption" in its answer, it was no secret that Clayton believed the preemptive effect of the Commodity Exchange Act should bar the common law claims. Indeed, counsel discussed this point on the record during the trial. Tr. 1006-07.

Clayton did not seek a ruling from the District Court at trial on the defense pled in its Answer because by the time of trial, Clayton's defense on the theory of preemption had been foreclosed in federal courts within the Eighth Circuit by the decision in *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984).

Similarly, Clayton did not pursue this theory when the case was initially appealed to the Eighth Circuit because it is the practice of the Eighth Circuit that each panel of the court is bound by the prior decisions of the Court. *See, United States v. Llewellyn*, 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard*, 706 F.2d 267, 269 (8th Cir.) *cert. denied*, 464 U.S. 934 (1983). Raising the preemption issue would, therefore, have been futile.

This treatment of the case enabled the Court of Appeals to validate its earlier decision that had been vacated by this Court by, once again, affirming the judgment of the District Court. It compels Clayton to, once again, petition this Court for relief from a punitive damage award out of all proportion to the compensatory damages awarded.

The events giving rise to this case occurred in 1980 and 1981. At that time,[5] Clayton was a commodity futures broker registered with the Commodity Futures Trading Commission (the "CFTC") as a futures commission merchant ("FCM").[6] From December, 1980 through February, 1981, one of Clayton's associated persons,[7] Martin Rachlin, churned the account that Respondent, David T. Jordan ("Jordan") maintained with Clayton and improperly switched trades between Jordan's account and other accounts maintained with Clayton. As a result, the primary beneficiary of a number of futures transactions executed by Clayton on various contract markets[8] was Rachlin, rather than Jordan (for whose benefit the transactions were ostensibly being executed).

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[5] Shortly after the jury's November, 1986 verdict in this case, Clayton withdrew from the commodity futures business. Prior to that time, Clayton had been one of the largest retail brokers of commodity futures in the United States.

[6] Pursuant to 7 U.S.C. § 6f, persons who trade in commodity futures contracts for the accounts of their customers must qualify and be registered as futures commission merchants.

[7] Pursuant to 7 U.S.C. § 6k, any person associated with an FCM in a capacity which involves the solicitation or acceptance of customers' orders or the supervision of persons so engaged is required to qualify and be registered as an "associated person."

[8] Pursuant to 7 U.S.C. § 7, futures markets, or boards of trade, which meet certain requirements are designated as "contract markets" by the CFTC. Unless a board of trade is so designated, it is illegal for the board of trade to operate as a marketplace for commodity futures contracts.

The trades charged to Jordan's account resulted in a net loss to him of $7,923.50 on his investment of $10,000.00. He sued Clayton to recover this loss.

At trial, Jordan proved that Rachlin's conduct (for which Clayton was responsible) violated the antifraud provision of the Commodity Exchange Act (the "CEA"), 7 U.S.C. § 6b, and constituted a breach of fiduciary duty under Missouri law. He further proved that this misconduct was the proximate cause of his loss. Accordingly, Jordan was awarded $7,923.50 in compensatory damages — i.e., the full amount of the loss he claimed to have sustained — on each theory of recovery.

In addition to the award of compensatory damages, Jordan sought an award of punitive damages. To that end, Jordan introduced into evidence a statement of Clayton's net worth before the case was submitted to the jury. At Jordan's request, the District Court instructed the jury that if it found from the preponderance of the evidence that Clayton had breached its fiduciary duty to Jordan, it could award punitive damages in an amount which would punish Clayton and deter Clayton and others from similar conduct.

Clayton objected to the procedure and the instructions by which the jury was permitted to award punitive damages on the grounds that its rights to equal protection and due process were being violated. Clayton's objections were overruled.

The jury awarded Jordan $400,000.00 in punitive damages, an amount fifty times that of the compensatory damage award, and four times the maximum monetary penalty Congress prescribed for a violation of the antifraud provisions of the Commodity Exchange Act.[9]

Clayton's motion for a new trial or remittitur on the ground that the punitive damage award was excessive was denied. In

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[9] *See* 7 U.S.C. § 9.

making its ruling, the District Court was guided by Missouri precedents which hold that punitive damages need not bear any relation to the compensatory damages awarded, so long as they bear "some relation to the injury inflicted." App. E, at pg. A-28. Although there had been no evidence at trial that Jordan had sustained any loss or injury other than the monetary loss of $7,923.50, the District Court justified its ruling on the basis that

> the actual damages recoverable were limited and *probably* do not reflect completely the injury inflicted on plaintiff. Therefore, affording due deference to the jury's determination, the $400,000 punitive damage award bears a rational relationship to the injury inflicted; it is not 'altogether disproportionate' to the injury inflicted on plaintiff. Accordingly, I will deny defendant's request that plaintiff be ordered to accept a lower damage award or face a new trial.

App., E, at pg. A-30 (emphasis supplied).

Clayton appealed to the U.S. Court of Appeals for the Eighth Circuit, which then affirmed the award of compensatory and punitive damages. After this Court vacated the Court of Appeals' October, 1988 decision and remanded the case for reconsideration, the Court of Appeals remanded the case to the District Court.

While the case was pending before the District Court, Clayton filed two motions to vacate the punitive damage award. One motion asserted that the award was erroneous because it was rendered under Missouri law which was preempted by the antifraud provisions of the CEA. The other motion asserted that Clayton's due process rights were violated (a) because the punitive damages awarded by the jury are excessive to the point of violating Clayton's right to due process because they bear no understandable or reasonable relationship to Jordan's injury, as measured by the jury's award of compensatory damages, and (b) given the fact that the jury was presented with evidence of

Clayton's net worth and permitted to award punitive damages based on the preponderance of the evidence, the jury instructions and standards by which the award was subject to review were insufficient to assure that the punitive damages awarded were not greater than necessary to fulfill the functions of punishment and deterrence.

The District Court held a hearing to reconsider its earlier decision in light of *Haslip* and to resolve Clayton's motions. At the hearing, to further support its claim that the award of punitive damages was greater than what was necessary to achieve the objectives of punishment and deterrence, Clayton made an offer of proof pertaining to its withdrawal from the commodity futures business, its financial condition, and the fact that Mr. Rachlin's scheme, insofar as it involved order switching, was an isolated event. The District Court refused to hear or consider Clayton's evidence on these points. It denied Clayton's motions, and reaffirmed its earlier order of February 7, 1987.

Clayton once again appealed. As it had in the District Court, Clayton argued that the introduction of evidence of its net worth and the use of the preponderance of the evidence standard of proof (to which Clayton had objected on constitutional grounds during the trial) violated its right to due process of law. Clayton's arguments on this point were admittedly different than they had been when the case was initially appealed. This Court's decision in *Haslip* required that adjustment. Each argument made by Clayton on appeal had, however, been presented to the District Court by the time of the second appeal. Moreover, Clayton's arguments on the second appeal rested on the same constitutional provisions and the same facts on which Clayton had relied in its first appeal. As it had at each prior step in the proceedings, Clayton challenged the punitive damage award as excessive. In addition, Clayton raised the preemption issue that it had articulated in its Petition to this Court and in its post-remand motion filed with the District Court.

Despite the fact that each of Clayton's points on appeal had been raised in the District Court and were encompassed by the questions presented in its earlier Petition to this Court, the Court of Appeals refused to consider any arguments not made by Clayton in its initial appeal to the Eighth Circuit. Based on this limited review, the Court of Appeals affirmed the judgment of the District Court.

REASONS FOR ISSUANCE OF THE WRIT

The Court of Appeals' most recent decision in this case resolved an issue of federal constitutional law in a manner that conflicts with the principles enunciated in this Court's decision in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). That issue, and the issue of preemption of common law by the antifraud provisions of the Commodity Exchange Act, as amended, are issues of substantial importance which should be conclusively resolved by this Court.

The Court of Appeals arrived at its decision in part because it adopted an overly narrow view of its responsibilities to review these matters under this Court's directive to reconsider the case in light of *Haslip* following the Court's granting of Clayton's earlier petition for a writ of certiorari.

The writ should issue to enable the Court to resolve the unsettled questions of federal law presented by this case, to ensure that the directive of the Court's order in Case No. 88-1483 has been carried out, and to give guidance to the lower courts and litigants concerning the procedures to be followed when this Court grants a petition for a writ of certiorari, vacates the decision of the lower court, and remands the case for reconsideration.

A. The Court Of Appeals' Decision Conflicts With The Principles Enunciated In *Haslip*

In *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court definitively held that the due process clause of the U.S. Constitution imposes limits on punitive damage awards and the procedures by which they are rendered. The Court upheld the punitive damage award in that case based on its conclusion that the procedures leading to the award and the standards by which the award was reviewed sufficiently limited the jury's discretion in setting the amount of

the award to assure that the award did no more than fulfill its proper purposes of punishment and deterrence. Those procedures, the Court said, "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Haslip*, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.

In this case, the jury's award of punitive damages was rendered and reviewed under standards prescribed by Missouri law, which requires that punitive damage awards "bear some relation to the injury inflicted and the cause thereof" but "need not bear any relation to the damages allowed by way of compensation." *See Wheeler v. Community Federal Savings & Loan*, 702 S.W.2d at 88. The District Court concluded that the jury's award of punitive damages in an amount fifty times greater than the compensatory damages awarded is not excessive, because "the actual damages recoverable were limited and probably do not reflect completely the injury inflicted on plaintiff."[10] App. E, at pg. A-30.

The Court of Appeals affirmed the District Court's order, based on its conclusion that the standard by which the District Court reviewed the punitive damage award was consistent with the requirements of due process articulated by this Court in *Haslip*. With few exceptions,[11] most courts have reached similar conclusions when confronted, post-*Haslip*, with claims that jury verdicts awarding punitive damages in amounts many times

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[10] Plaintiff's pleadings contain no allegation that he sustained any loss or injury other than the diminution of the value of his account maintained with Clayton. There was no evidence at trial of any greater or different loss or injury.

[11] *See, e.g., Johnson v. Hugo Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992) (en banc); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991); *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991).

greater than the actual damages awarded are so excessive as to violate the defendant's right to due process of law. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *cert. granted*, 61 U.S.L.W. 3400 (Nov. 30, 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991); *Coyne v. Allstate Insurance Co.*, 771 F.Supp. 673 (E.D. Pa. 1991); *Commonwealth Lloyd's Insurance Co. v. Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992); *Wolf v. Goodyear Tire and Rubber Co.*, 808 S.W.2d 868 (Mo. App. 1991).

Clayton submits that where, as in this and an ever growing number of other cases, courts review juries' awards of punitive damages for excessiveness by comparing the amount of any particular award to an unproven and undefined "injury inflicted" rather than to the jury's award of compensatory damages, the effect is to grant to the jury the very type of unlimited discretion to set the amount of the punitive damage award which this Court found problematical in *Haslip*.[12] The Court should grant Clayton Petition and issue its writ in order to determine whether such methods of review deprive defendants of their right to due process of law and to ensure adherence to the principles laid down in *Haslip*.

B. The Court Should Resolve The Longstanding Controversy Over Whether The Commodity Exchange Act Preempts State Law

In *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247, 255, 67 S.Ct. 1160, 1165, 91 L.Ed. 1468, 1474 (1947), the Court indicated that but for a savings clause which was then part of Section 4c of the Commodity Exchange Act, 7 U.S.C. § 6c, the antifraud provisions of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 6c, would probably preempt state law otherwise governing the conduct proscribed by those provisions. That savings

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[12] *See Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. at 1043, 113 L.Ed.2d at 20.

clause was repealed in 1974 pursuant to Section 402(c) of the Commodity Futures Trading Act of 1974, Pub. L. 93-463, 88 Stat. 1389, 1413 (the "CFTC Act").

Concurrently with the repeal of the savings clause previously found in 7 U.S.C. § 6c, Congress further amended the CEA to provide a full panoply of remedies and sanctions for conduct, such as that at issue in this case, proscribed by Section 4b of the CEA, 7 U.S.C. § 6b. A person registered as Clayton was with the CFTC can be subjected to administrative, civil and criminal penalties for engaging in conduct like that at issue in this case. *See* 7 U.S.C. §§ 9 (administrative action to preclude trading on commodity futures exchanges, revoke registrations, and impose monetary penalties), 13(c) (criminal penalties of fines and imprisonment), 13 a-1 (civil actions to enjoin or restrain violations). Additionally, such persons may be forced to compensate those damaged by their conduct through administrative reparation procedures, *see* 7 U.S.C. § 18, or private civil actions, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982) (recognizing implied private rights of action for violations of the CEA).

In order to prevent over-deterrence, the CEA provides specific procedures that must be followed to sanction conduct proscribed by the statute. *See, e.g.*, 7 U.S.C. § 9. It further prescribes the factors that must be considered in determining the amount of monetary penalties to be assessed for violations of the statute. 7 U.S.C. § 9a. As these provisions make clear, Congress has made a policy decision about what remedies and sanctions are appropriate for conduct of the type at issue in this case, and the procedures that should be followed in meting out such sanctions and providing those remedies.

Since the savings clause was repealed, and these other provisions of the CEA were enacted or revised pursuant to the CFTC Act, numerous courts have struggled with the question of whether,

and if so, to what extent, the Commodity Exchange Act, as amended, preempts other law.[13] The issue has been resolved by

[13]*See, e.g., The American Agricultural Movement, Inc. v. Chicago Board of Trade*, 770 F. Supp. 407 (N.D. Ill. 1991), *aff'd in part, rev'd in part*, 977 F.2d 1147, 1992-2 Trade Cases ¶ 70,003 (7th Cir., Oct. 20, 1992); *Marshall v. Green Giant Company*, 942 F.2d 539 (8th Cir. 1991); *Khalid Bin Talal Bin Abdul Azaiz Al Seoud v. E.F. Hutton & Company, Inc.*, 720 F. Supp. 671 (N.D. Ill. 1989); *Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987) *cert. denied*, 486 U.S. 1056, 108 S.Ct. 2824, 100 L.Ed.2d 925 (1988); *Point Landing Co., Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986) *aff'd*, 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982); *Kelly v. Carr*, 691 F.2d 800 (6th Cir. 1980); *E.F. Hutton & Co. Inc v. White*, [1987-90 Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,314 (D. Mass. 1988); *Babst v. Morgan Keegan & Co.*, 1987 WL 15322 (E.D. La. 1987); *Cady v. A.G. Edwards & Sons, Inc.*, 648 F. Supp. 621 (D. Utah 1986); *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203 (N.D. Ga. 1985); *McCarthy v. Paine Webber, Inc.*, 618 F. Supp. 933 (N.D. Ill. 1985); *Mallen v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 605 F. Supp. 1105 (N.D. Ga. 1985); *Embeita v. Heinold Commodities, Inc.*, [1984-86 Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,594 (E.D. Va. 1985); *Sall v. G. H. Miller & Co.*, [1984-86 Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,686 (D. Colo. 1985); *Zieg v. Shearson/American Express, Inc.*, 592 F. Supp. 612 (E.D. Va. 1984); *Peavey Company v. Mitchell*, [1982-84 Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,939 (W.D. Okla. 1983); *Taylor v. Bear Stearns and Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Vaccariello v. Financial Partners Brokerage, Ltd.*, [1982-84 Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,874 (N.D. Ill. 1983); *Strobl v. New York Mercantile Exchange*, 561 F. Supp. 379 (S.D.N.Y. 1983); *Gonzalez v. Paine, Webber, Jackson, & Curtis, Inc.*, [1982-84 Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,615 (S.D.N.Y. 1982); *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kansas 1979); *Poplar Grove Planting & Refining Co., Inc. v. Bache, Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Ghandour v. Shearson Lehman Hutton, Inc.*, 570 N.Y.S.2d 541 (Sup. Ct. App. Div. 1991); *Poncy v. Shearson Lehman Bros., Inc.*, 20 Sec. Reg. L. Rep. (BNA) 26 (Fla. Cir. Ct. 1987) *rev'd*, 548 So.2d 1196 (Fla. Ct. App. 1989); *Rupert v. Clayton Brokerage Co. of St. Louis*, 705 P.2d 988 (Colo. Ct. App. 1985) *rev'd*, 737 P.2d 1106 (Colo. 1987); *Zimmerman v. Merrill Lynch*, 283 S.E.2d 639 (Ga. Ct. App. 1981) *rev'd*, 285 S.E.2d 181 (Ga. 1981); *Sinclair & Co., Inc. v. Gurule*, 757 P.2d 225 (Idaho Ct. App. 1988); *Paine, Webber, Jackson, & Curtis, Inc. v. Conaway*, 515 F. Supp. 202 (N.D. Ala. 1981); *WestLake v.*

(Footnote 13 continued on next page)

those courts in different ways for different reasons. *Compare, e.g., Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982)(no preemption); *Haines v. First Commodity Corp. of Boston*, [1980-1982 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980)(Commodity Exchange Act preempts state law); *Bache-Halsey-Stuart, Inc. v. Hunsucker*, 248 S.E. 2d 567 (N.C. Ct. App. 1978) (Commodity Exchange Act preempts state statutes, but not state common law).

The controversy over the preemptive effect of the CEA does not persist simply because the lower courts have disagreed over the proper resolution of the issue. The volume of trading in the futures markets and the volatility of prices in highly leveraged transactions frequently results in traders sustaining substantial losses in short time spans. On the retail level, most orders are placed by telephone. These circumstances create a fertile ground for litigation.[14] When litigation involving commodity futures transactions does ensue, the prospect of large awards of punitive damages available under state law theories of recovery makes the monetary stakes of the litigation enormous even where

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(Footnote 13 continued)

Abrams, 504 F. Supp. 337 (N.D. Ga. 1980); *Singer v. Clayton Brokerage Co. of St. Louis, Inc.*, 620 S.W.2d 720 (Tex. Ct. App. 1981); *Haines v. First Commodity Corp. of Boston* [1980-82 Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980); *Bache-Halsey-Stuart, Inc. v. Hunsucker*, 248 S.E.2d 567 (N.C. Ct. App. 1978); *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637 (Tex. 1977).

[14] For example, during 1987 through 1990, Commerce Clearinghouse reported decisions in 583 actions in state and federal courts arising out of commodities futures trades. [1987-90 Binder] Comm. Fut. L. Rep. (CCH), 1987-90 Case Table. During 1990 through 1992, Commerce Clearinghouse reported decisions in an additional 462 cases. [1990-92 Binder] Comm. Fut. L. Rep. (CCH), 1990-92 Case Table. These figures, of course, do not reflect the volume of litigation in this area which is resolved without the issuance of a reported decision.

plaintiff's actual losses are modest.[15] This phenomenon can lead to protracted, time consuming and costly litigation over the causes of and responsibility for even relatively small losses.[16]

By contrast, the private remedies which Congress created for conduct violative of the Commodity Exchange Act limit persons injured by such conduct to recovery of actual damages. 7 U.S.C. §§ 18, 25. Thus, invocation of the defense of preemption, where available and when successful, materially reduces defendants' expense and exposure associated with claims arising out of commodity futures transactions.

Inevitably, then, the question of whether the Commodity Exchange Act preempts state law will continue to consume the time and resources of lower courts until this Court provides a definitive answer.

C. The Court Of Appeals Failed To Discharge Properly The Directive Of This Court

The Court of Appeals refused to consider Clayton's preemption argument on the ground that the issue was not addressed in

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[15] This case, in which the plaintiff was awarded punitive damages of $400,000, or fifty times the plaintiff's losses, is not particularly extraordinary in the annals of commodity futures litigation. In *DeRance v. PaineWebber, Jackson & Curtis, Inc.*, 872 F.2d 1312 (7th Cir. 1989), punitive damage awards totalling $20,500,000 were affirmed. *See also Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982)(affirming $350,000 punitive damage award); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984)(affirming $275,000 punitive damage award).

[16] This case clearly illustrates the effect of this phenomenon. Jordan's suit was initially filed in the District Court in 1982. It was not tried until 1986. In the interim, vast amounts of discovery were taken, not so much to develop evidence of the events and actions which directly affected Jordan's account, but rather to develop evidence of other, similar misconduct by Mr. Rachlin which was then used to support the claim for punitive damages. At trial, most of the five days of testimony were devoted to such evidence. Since the jury's verdict, the parties have spent another six years litigating appeals of these issues.

Haslip and was, therefore, outside the scope of this Court's remand order.[17] Through a similar rationale, the Court of Appeals held that it need not consider on remand whether the constraints in this case on the jury's discretion to award punitive damages were sufficient to afford Clayton due process of law.[18] These rulings give, at best, limited effect to that portion of this Court's Order which directed the Court of Appeals to reconsider Clayton's appeal.[19] They entirely ignore those portions of this Court's March 18, 1991 Order which granted Clayton's petition

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[17] The Court of Appeals also held that Clayton had waived consideration of its preemption argument because the argument had not been expressly raised in Clayton's first appeal. This rationale should have been effectively foreclosed by this Court's earlier granting of Clayton's petition for a writ of certiorari, in which Clayton asserted its preemption argument, without reservation of issues. Moreover, the rule against considering issues raised for the first time on appeal is prudential only, not jurisdictional. *See, e.g., Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed. 2d 62 (1988); *Struempler v. Bowen*, 822 F.2d 40 (8th Cir. 1987). Where, as here, the issue was presented for decision by the District Court before being presented in the Court of Appeals, the prudential considerations which justify the adherence to that rule are not served by enforcement of the rule.

[18] Unlike the preemption question, the Court of Appeals did not suggest that *Haslip* did not address this issue. Instead, this disposition was explained by the fact that Clayton had not articulated its due process arguments in the course of the initial appeal in the same fashion as was obviously appropriate once this Court announced the controlling principles of law in *Haslip*.

[19] The Eighth Circuit's refusal to consider facets of Clayton's due process arguments grounded on principles first articulated by this Court in *Haslip* because Clayton did not articulate them pre-*Haslip*, for example, does not seem compatible with the directive to reconsider the case in light of *Haslip*. *See, Board of Trustees v. Sweeney*, 439 U.S. 24, 26, 99 S.Ct. 295, 297, 58 L.Ed.2d 216, 219 (1978) (Stevens, J., dissenting).

without reservation of issues and vacated the Court of Appeals' prior decision.[20]

Although the Court vacated the Eighth Circuit's decision in its entirety, in effect sending the case back to the Court of Appeals for a new appeal, the Court of Appeals treated the case as though the previous proceedings in that court cast Clayton's arguments on appeal in stone.

This Court frequently issues orders granting a petition for certiorari, vacating the judgment below, and remanding the case for reconsideration in light of the holding in another case recently decided by the Court. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review In Cases Held for Plenary Decisions*, 11 HASTINGS CONSTITUTIONAL L.Q. 5 (1983).[21] The Court has, however, given

[20] By granting Clayton's Petition without reservation of issues, the Court at least seemed to indicate that all of the issues raised by Clayton's Petition, including the question of preemption, warranted consideration. *Cf., TXO Production Corp. v. Alliance Resources Corp.*, 1992 LEXIS 7450, 61 U.S.L.W. 3400 (Nov. 30, 1992)(limiting grant of certiorari to two of the questions presented). The Court of Appeals, however, concluded it was only required to consider due process challenges to the punitive damage award, because the phrase of the Order remanding the case expressly directed the Court of Appeals to consider the appeal in light of the principles enunciated in *Haslip*.

[21] Including the Order entered in this case, the Court issued no less than 12 such orders referencing the decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). *See, Portec, Inc. v. The Post Office*, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *Reserve Life Insurance Co. v. Eichenseer*, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991); *Hospital Authority of Gwinnett County v. Jones*, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991); *Fleming Landfill v. Garnes*, 111 S.Ct. 2882, 115 L.Ed.2d 1048 (1991); *Intercontinental Life Insurance Co. v. Lindblom*, 111 S.Ct. 1575, 113 L.Ed.2d 641 (1991); *Southern Life & Health Insurance Co. v. Turner*, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991); *AMCA Int'l Finance Co. v. Hilgedick*, 111 S.Ct. 1614, 113 L.Ed.2d 713 (1991); *Pacific Lighting Corp. v. MGW Inc.*, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *International Society of Krishna Consciousness v. George*, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991); *Church of Scientology of California v. Wollersheim*, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991); *Transamerica Occidental Life Insurance Co. v. Koire*, 111 S.Ct. 2253, 114 L.Ed.2d 706 (1991).

little guidance to the lower courts (or litigants) concerning the scope of review it intends that the lower courts afford litigants when cases are remanded in this fashion. *Id.* at 6.

As a result, the nature of the post-remand proceedings and the scope of review afforded litigants in those proceedings varies widely. For example, in *Eichenseer v. Reserve Life Insurance Company*, 934 F.2d 1377 (5th Cir. 1991), the court examined the sufficiency of the post-verdict review afforded the defendant in that case despite the fact that the defendant's initial due process challenge to the punitive damage award had been premised solely on a "void-for-vagueness" argument. *Compare Eichenseer v. Reserve Life Insurance Company*, 881 F.2d 1355 (5th Cir. 1989); *Eichenseer v. Reserve Life Insurance Company*, 682 F. Supp. 1355 (N.D. Miss. 1988). Similarly, in both *Wollersheim v. Church of Scientology*, and *MGW, Inc. v. Fredericks Development Corporation*, the courts upon remand considered whether the punitive damage awards entered in those cases complied with the due process requirements enunciated in *Haslip* despite the fact that the defendants had not previously raised "Haslip" challenges. *See Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331 (Ct. App. 2d Dist. 1989); *Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532 (Ct. App. 2d Dist. 1992); *MGW, Inc. v. Fredericks Development Corporation*, 6 Cal. Rptr.2d 888 (Ct. App. 4th Dist. 1992). The post-remand review conducted by the Eighth Circuit in this case was, of course, much more limited.

In view of the Court of Appeals' failure to discharge its obligations under this Court's March 18, 1991 Order and the widespread inconsistency among lower courts' responses to orders like the March 18, 1991 Order in this case, the Court should issue its writ to enforce that Order and clearly define the lower courts' responsibilities in cases in which such orders are issued.

CONCLUSION

Two lower courts have been directed to review the punitive damage award in this case in light of this Court's decision in *Haslip*. Neither court concluded that the punitive damage award bears an understandable relationship to the compensatory damage award. Neither court questioned that the award was four times greater than the maximum civil penalty Congress prescribed for the conduct at issue. Both courts, however, found reasons not to set the award aside.

Such decisions are, unfortunately, more typical than atypical of the manner in which the lower courts have dealt with large punitive damage awards, even after this Court's decision in *Haslip*. The writ should issue in this case to assure that this pattern does not continue.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3606

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.
Appellant,

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: February 10, 1992
Filed: September 18, 1992

Before FAGG, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Clayton Brokerage Company appeals from a decision of the district court[1] denying Clayton's motions to vacate the judgment against it and to vacate the punitive damages award. We affirm.

I.

David Jordan established a commodity futures trading account with Clayton Brokerage Company (Clayton) in mid-1980. One of the brokers at the firm fraudulently churned the account, resulting in a $7,923.50 actual loss to Jordan and $5,292.00 in commissions to the broker. Jordan sued, claiming breach of fiduciary duty, fraudulent misrepresentation, and violation of the Commodity Exchange Act (CEA), 7 U.S.C. § 6(b). The jury

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[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

found for Jordan and awarded actual damages, as well as punitive damages in the amount of $400,000. On appeal, we upheld the punitive damages award as not excessive under Missouri law. *Jordan v. Clayton Brokerage Co.*, 861 F.2d 172 (8th Cir. 1988) (*Jordan I*). We also rejected Clayton's claims that punitive damages awards require a standard of proof higher than "by a preponderance" and that admission of evidence of Clayton's net worth violated its equal protection rights. *Id.*

Clayton petitioned the Supreme Court for a writ of certiorari. The Supreme Court remanded the case to us for consideration in light of its decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). We remanded it in turn to the district court. Clayton moved to vacate the judgment and for judgment in its favor on the claims for fraudulent misrepresentation and breach of fiduciary duty. Clayton also moved to vacate the punitive damages award on the grounds that the award violated Clayton's rights to due process and equal protection. The district court denied these motions, and Clayton now appeals.

II.

The first issue raised in Clayton's petition for certiorari was whether a civil punitive damages award violates a defendant's right under the eighth amendment to be free from excessive fines. Clayton dropped this issue on remand to the district court, as well it should have in the light of the Court's intervening decision in *Browning-Ferris Indus. v. Kelco Disposal. Inc.*, 492 U.S. 257 (1989).

The second issue Clayton raised was whether the Commodity Exchange Act preempts state common law for fraud. The district court believed that the issue was outside the scope of the Supreme Court's remand. We agree. Clayton contends that the Supreme Court, by granting the petition for certiorari and remanding for reconsideration in the light of *Haslip*, directed the court to consider all of the issues raised in its petition. This

argument is without merit. *Haslip* does not involve the CEA. Thus, this is a new issue before us. Preemption is an affirmative defense which Clayton did not plead. *See First Nat'l Bank v. Aberdeen Nat'l Bank*, 627 F.2d 843, 851 (8th Cir. 1980); Fed. R. Civ. Proc. 8(c). "'As a general rule, we do not consider arguments or theories on appeal that were not advanced in the proceedings below.'" *Warren v. City of Lincoln. Neb.*, 864 F.2d 1436, 1439 (8th Cir.) (en banc) (quoting *Wright v. Newman*, 735 F.2d 1073, 1076 (8th Cir. 1984)), *cert. denied*, 490 U.S. 1091 (1989); *see also Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016, 1017 (1988). This issue is not properly before us, and we will not consider it.

The third issue Clayton raised was whether a punitive damages award is constitutionally permissible when wrongdoing is established by a preponderance of the evidence rather than beyond a reasonable doubt. Clayton raised this issue initially in the district court and then appealed to this court, where we decided against Clayton. *See Jordan I*, 861 F.2d at 178 ("[P]unitive damages are civil in nature and are therefore not required by the Constitution to be subject to proof beyond a reasonable doubt.").

The Supreme Court considered and explicitly rejected an identical challenge in *Haslip*. 111 S. Ct. at 1046 n.11. The Court observed, "[w]e have considered the arguments raised by Pacific Mutual . . . as to the constitutional necessity of imposing a standard of proof of punitive damages higher than 'preponderance of the evidence.' . . . We are not persuaded, however, that the Due Process Clause requires that much." *Id.* Consequently, Missouri's standard of proof for awarding punitive damages satisfies the constitutional requirements of due process set forth by the Supreme Court in *Haslip*.

The fourth issue Clayton raised was whether a defendant's rights to equal protection and due process are violated when a jury is presented with evidence of the defendant's net worth. This

issue was raised before the district court and appealed to this court in *Jordan I*, although it was framed only as an equal protection argument. We decided against Clayton on this issue because the district court admitted evidence of net worth not on the issue of whether to award punitive damages, but for the jury's consideration as to the amount of punitive damages to award if it found first that Clayton's conduct was malicious. *Jordan I*, 861 F.2d at 178. Having reviewed *Jordan I* in the light of *Haslip*, we see no reason to change our decision. Jury Instruction No. 12 informed the jury that it could award punitive damages as punishment for malicious conduct, defined "malicious," told the jury that a punitive damages award was discretionary, and told the jury to determine any damages with "calm discretion and sound reason." The instruction further told the jury that it could award "punitive damages in such a sum as [it] believe[d] would serve to punish defendant and to deter defendant and others from like conduct." Thus, the instruction was essentially similar to that given in *Haslip*.

Once awarded, a court may reduce or reverse punitive damages in Missouri only if the award "is the product of bias or prejudice or is otherwise an abuse of discretion." *Kerr v. First Commodity Corp.*, 735 F.2d 281, 289 (8th Cir. 1984). In making this assessment, the court is to take several factors into account. First, punitive damages must bear some relation to the injury inflicted, though they need not bear any relation to the actual damages allowed. *Wheeler v. Community Fed. Sav. & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985). The court should then assess the character and standing of the parties, the malice with which the act was done, and the financial condition of the defendant, as well as the amount which would serve to deter the occurrence of similar acts in the future. *Id.* at 87. The court should also consider mitigating and aggravating circumstances. *See Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280, 284-85 (Mo. Ct. App. 1973).

We conclude that Instruction No. 12 and the post-verdict standard of review make what the Court said about the Alabama procedure equally applicable in this case:

> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Haslip, 111 S. Ct. at 1045.

Accordingly, we reject Clayton's challenge to the admission of evidence concerning its net worth.

Finally, Clayton argues that the punitive damages award must be vacated because it does not comply with the due process requirements set out in *Haslip*. Specifically, Clayton claims that Missouri law does not apply sufficient constraints on the jury's discretion in making punitive damages awards. The district court noted that Clayton first raised this argument after remand and held that the issue should not be considered. We do not believe that the remand order requires us to consider an issue raised for the first time on remand. We therefore opt to exercise our discretion against reaching these constitutional claims. *See Warren*, 864 F.2d at 1439 (whether to reach an issue first brought on appeal is a discretionary decision); *Wright*, 735 F.2d at 1077 (same).

The district court's judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number 82-1107-CV-W-9

Davit [sic] T. Jordan,
Plaintiff,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Defendant.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to xxxx hearing before the Court. The issues have been xxxx heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1) defendant's Motion to Vacate Judgment and for Judgment in its Favor as to Counts I and III of Plaintiff's Second Amended Complaint is denied; and

2) defendant's Motion to Vacate the Punitive Damage Award on the Grounds that it Violates Defendant's Rights to Due Process and Equal Protection is denied.

Entered On Oct. 10, 1991

October 9, 1991
Date

R.F. Connor
Clerk

/s/ Tina Duer
(By) Deputy Clerk

Document #334

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

DAVID T. JORDAN,

Plaintiff,

v.

CLAYTON BROKERAGE COMPANY
OF ST. LOUIS, INC.,

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT AND FOR JUDGMENT IN ITS FAVOR AS TO COUNTS I AND III OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND DENYING DEFENDANT'S MOTION TO VACATE THE PUNITIVE DAMAGE AWARD ON THE GROUNDS THAT IT VIOLATES DEFENDANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

[Filed: Oct. 9, 1991]

On June 10, 1991, the Eighth Circuit Court of Appeals issued the following Memorandum Order: "We remand this case to the District Court which should reconsider the award of punitive damages in light of *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032 (1991)."

The defendant filed 1) Motion to Vacate Judgment and for Judgment in its Favor as to Counts I and III of Plaintiff's Second Amended Complaint, and 2) Motion to Vacate the Punitive Damage Award on the Grounds that it Violates Defendant's Rights to Due Process and Equal Protection.

On October 2, 1991, oral argument was heard on the applicability of *Pacific Mutual* to the punitive damages award in this case and on defendant's motions.

For the reasons stated on the record on October 2, 1991, it is ORDERED that:

1) defendant's Motion to Vacate Judgment and for Judgment in its Favor as to Counts I and III of Plaintiff's Second Amended Complaint is denied; and

2) defendant's Motion to Vacate the Punitive Damage Award on the Grounds that it Violates Defendant's Rights to Due Process and Equal Protection is denied.

/s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri

October 9, 1991.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal From the United States District Court
for the Western District of Missouri.

Submitted: May 22, 1991
Filed: June 10, 1991

Before WOLLMAN, Circuit Judge, and HEANEY and ROSS, Senior Circuit Judges.

ORDER

We remand this case to the district court which should reconsider the award of punitive damages in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal From the United States District Court
for the Western District of Missouri.

Submitted: January 13, 1988
Filed: October 17, 1988

Before HEANEY and WOLLMAN, Circuit Judges, and ROSS, Senior Circuit Judge.

HEANEY, Circuit Judge.

Clayton Brokerage Co. of St. Louis, Inc. (Clayton) appeals from the district court's judgment entered in accordance with a jury verdict awarding David T. Jordan compensatory damages of $7,923.50 and punitive damages of $400,000.00. We affirm.

I. BACKGROUND

On June 30, 1980, Jordan established a commodities futures trading account with Clayton. Prior to that time, Jordan had traded in commodities futures with several other firms and had lost money. Jordan's account with Clayton remained dormant until December of 1980 when he placed a trade and lost $677.50. Six weeks later, Jordan called Martin Rachlin, a Clayton broker and the branch manager of Clayton's Kansas City office. After some discussion, Jordan gave discretionary control over the

account to Rachlin. The account, however, was never formally listed as discretionary in Clayton's records.

Rachlin began placing trades in Jordan's account in earnest on February 3, 1981. By March 13, 1981, Rachlin had placed a total of 94 trades in the account and had lost $7,923.50. The trades generated approximately $5,292.00 in commissions. While Rachlin was placing trades in the account, Jordan questioned him about the short term trading strategy he appeared to be following and the losses incurred in the account. Rachlin assured Jordan that he was an experienced trader and that some short term trading was necessary to take advantage of market trends.

When the equity in Jordan's account was depleted, Jordan received a margin call and notice that no further trading could take place in the account until the call was met. Jordan then contacted Rachlin to complain. Rachlin falsely responded that the notice was the result of a computer error. Rachlin then transferred into Jordan's account a number of profitable trades he originally placed in other accounts in order to regain Jordan's confidence, bring the account out of deficit status, and further trade the account. Jordan was unaware of this action because the confirmation slips sent to him did not indicate that the orders had been switched into his account.[1] Eventually, Jordan closed the account and brought an action in federal district court alleging misrepresentation in violation of the Commodities Exchange Act, 7 U.S.C. § 6(b), and breach of fiduciary duty under Missouri common law.

At trial, Jordan proceeded on the theory that his losses were a small portion of those caused by a larger "plan" pursued by Rachlin and encouraged by Clayton's failure to take measures

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[1] The evidence at trial also indicated that on several occasions Rachlin switched into other accounts profitable trades originally placed in Jordan's account. Overall, however, Jordan's account posted a small net gain as a result of the order switching.

against Rachlin despite its knowledge of his actions. Pursuant to this plan, Rachlin gained discretionary control over an account and failed to record that control as required by company policy. Rachlin then excessively traded the account, generating large commissions for himself and Clayton, while establishing no coherent trading strategy. Rachlin also engaged in order switching. Rachlin switched some profitable trades into accounts he opened and controlled under fictitious names. More commonly, however, Rachlin switched orders in an effort to retain the confidence of investors, often bringing their accounts out of a deficit status in order to further trade them and generate additional commissions. If the customer complained, Rachlin misrepresented his skill and assured the investor that future trading would be profitable. Finally, if an investor complained directly to other Clayton employees, the investor was informed that his or her account was not listed discretionary and that, therefore, the losses were the investor's responsibility.[2]

The jury found for Jordan on both claims and awarded him $7,923.50 in compensatory damages and $400,000.00 in punitive damages. Clayton then brought a motion seeking a reduction of the punitive damages award or, in the alternative, a new trial. The district court denied the motion. Clayton appeals on two grounds: (1) that the punitive damages award is grossly excessive in relation to the actual damages, and (2) that the punitive damages award is the result of prejudice caused by improper admission of testimony detailing the larger plan.

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[2] Prior to trial, Clayton brought a motion in limine to exclude much of the "plan" evidence Jordan intended to introduce. After extensive briefing on the issue and a half day of oral argument, the district court substantially overruled Clayton's motion to exclude the evidence. The court did, however, limit evidence concerning four other Clayton customers, each of whom claimed to be victims of the larger plan, by prohibiting detailed testimony about the customers' account statements and trading transactions.

II. EXCESSIVENESS

Clayton argues that the punitive damages are plainly excessive. In particular, it cites the 50-1 ratio of punitive to actual damages as evidence of gross excessiveness. Clayton contends that under Missouri law, punitive damages in the range of 2-1 to 4-1 are reasonable. Jordan responds that the award is supported by the degree of malice shown and by Clayton's financial condition. Moreover, Jordan argues that the award is consistent with the punitive awards affirmed in *Kerr v. First Commodity*, 735 F.2d 281, 289 (8th Cir. 1984) (actual damages of $21,942.00 and punitive damages of $275,000.00) and *Wegerer v. First Commodity Corp.*, 744 F.2d 719 (10th Cir. 1984) (actual damages of $10,775.00 and punitive damages of $250,000.00).

We find *Kerr* instructive on this point. *Kerr* involved an action for commodities trading fraud against a commodities trading firm, brought pursuant to both federal law and Missouri state law. On appeal, the firm challenged the punitive award of $275,000.00 as excessive in light of the trial court's remittitur of actual damages from $75,000.00 to $21,942.00. This Court upheld the punitive award, stating:

> The degree of malice and the financial wealth of the defendant both are relevant in determining the proper amount of punitive damages. Missouri courts require a nexus between the wrong committed by the defendant and the amount of punitive damages, not between the amount of actual damages awarded and the amount of punitive damages. The jury has wide discretion in determining the amount of punitive damages, and that determination is not to be disturbed unless it is the product of bias or prejudice or is otherwise an abuse of discretion.

735 F.2d at 289 (citations omitted).

Thus, the fact that the punitive damages award in this case is significantly greater than the actual damages award does not, in

itself, require reduction of the punitive damages. Rather, we must examine whether there is a sufficient nexus between the wrong committed by Clayton and the amount of punitive damages. *See Wheeler v. Community Federal Savings and Loan Assn.*, 703 S.W.2d 83, 88 (Mo. Ct. App. 1986, (upholding actual damage award of $500.00 and punitive award of $100,000.00 stating that "[t]he general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation.*").

In this regard, the district court stated in its Memorandum and Order:

> [T]he jury could have concluded reasonably that [Clayton] placed Martin Rachlin in a position where [Jordan] was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence * * * placed in him resulting in substantial financial harm to [Jordan] and substantial financial gain to Rachlin and [Clayton]; that [Clayton] failed to supervise in any meaningful way Rachlin's handling of [Jordan's] account; that even when complaints about Rachlin were received, [Clayton] failed to investigate adequately; that [Clayton] ignored information it had that Rachlin was violating [its] regulations; and that because of [Clayton's] substantial net worth, a punitive damage award of $400,000 was necessary to deter similar behavior by [Clayton] in the future.

District Court Memorandum and Order at 6-7.

We have independently reviewed the evidence presented at trial concerning Clayton's conduct and affirm the district court's finding that the evidence fully supports the punitive damages award. For example, we note that James W. Hanson, a broker with Clayton, testified that in 1979 and 1980, while he was branch manager of Clayton's Kansas City office, he investigated

customer allegations that Rachlin engaged in discretionary and excessive trading in accounts listed as nondiscretionary. As a result of the investigation, Hanson concluded that Rachlin "had been making unauthorized trades in [two] customer accounts." Transcript at 296. Moreover, he testified that he informed his superiors in Clayton's home office in St. Louis of his conclusion. Despite this information, Clayton relieved Hanson from his position as branch manager and promoted Rachlin to that position. Transcript at 183.

With respect to excessive trading, Leslie Jordan, an expert retained by Jordan, testified that of the 32 days on which Rachlin could have traded Jordan's account, the account was actually traded on 24 days. In total, 84 trades were executed, generating an average daily commission of $165.39.[3] The expert testified

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[3] The expert also testified that 70% of the trades in Jordan's account were "day trades." The expert stated that such trades are indicative of discretionary control of the account by the broker due to the extensive communication that would be required for the customer to engage in such trading. In addition, the expert testified:

> Q. What is the basic interest or objective of a person who's a speculator in the futures market?
>
> A. Hope to have trading profits that exceed your cost of doing business, which is your commissions.
>
> Q. Now, taking that interest or that objective and bearing it in mind, could the trading that you described here in Mr. Jordan's account in your testimony today meet or satisfy that objective?
>
> A. I think it is heavily weighed (sic) against that possibility. Part — because it was predominantly day trades, that means the only profit that could be made was how much the market moved in that given day.
>
> The market moves in fixed limits. It can't go from $400 an ounce to $500 an ounce in a day. It can move from $400 an ounce to [$]410. If you are right, and bought early in the day when it was low and sold high, it still backs out how much you can possibly make in a given day. It must move more than the cost of doing commissions * * * .

(Footnote 3 continued on next page)

that in order to simply pay the commissions the account would have had to generate profits of more than 182 percent per month. The record also contains testimony that Clayton normally received at least a portion of the trading commissions. Transcript at 408.

Concerning order switching, Martha LaQuey testified that shortly after she was fired by Rachlin, she met with Ralph E. Bradac, an employee with Clayton's compliance department in St. Louis, and informed him that Rachlin was engaged in order switching.[4] Transcript at 405. Bradac's deposition, parts of which were read into the record at trial, indicates that he reported the conversation to Clarence Delbridge, then head of Clayton's compliance department. Bradac deposition at 127. In addition, the record establishes that even if Clayton had not been explicitly informed of the order switching, it had available to it computerized information from which it should reasonably have detected the order switching scheme. Delbridge deposition at 74-80;

(Footnote 3 continued)

> The problem with trying to make a profit with day trading is, that you got things stacked against you. First you have to overcome the commission cost, and then you have to have enough price move within the given time period to compensate for that and still give you a net overall profit.
>
> It's a technique that rarely produces a profit in speculative customer accounts that are paying full-commission rates.
>
> Q. Would you say that the trading in Mr. Jordan's account that has already been described was consistent with or was contrary to the basic interest of making a profit?
>
> A. I think having heavy concentration in day trades in a small speculative account, paying full commission, is a doomed strategy. The customer can't come out ahead. There are too many odds against him.

Transcript at 758-59.

[4] In contrast, Bradac's deposition reflects that the meeting did not occur until March 17, 1981, some four days after the last trade in Jordan's account and one day after Rachlin was fired.

transcript at 300-05. Thus, the record contains ample evidence from which the jury could have concluded that Clayton knew Rachlin was engaged in the order switching scheme.

In sum, the record fully supports the district court's finding that Clayton's acts and omissions are sufficiently related to the injury suffered by Jordan to justify the punitive damages award.

III. PREJUDICE

Clayton also argues that the punitive damages award resulted from prejudice caused by improper admission of evidence concerning the larger plan. Specifically, it contends that the evidence was improperly admitted because, under Federal Rules of Evidence 403 and 404, its probative value was far outweighed by its prejudicial and confusing effect on the jury. In this regard, Clayton points out that the bulk of the contested evidence concerns events that occurred prior to the trading activity in Jordan's account which are irrelevant to Jordan's claims. Clayton also argues that the single limiting instruction given the jury concerning the plan evidence was insufficient to overcome the prejudice caused by its admission.

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has had occasion to apply Rule 404(b) in a situation very similar to the instant case. In *Kerr v. First Commodity Corporation of Boston*, 735 F.2d 281, 286-88 (8th Cir. 1984), we considered a challenge to the trial court's admission of testimony of customer who were not parties to an action against a commodities futures trader. The customers testified that the trader

defrauded them in a manner similar to that alleged by the plaintiff.[5] We affirmed the district court's admission of the testimony, finding that the evidence was properly admitted on the issue of punitive damages to show knowledge, intent and absence of mistake on the part of the trader. *Id.; see also Wegerer v. First Commodity Corporation of Boston*, 744 F.2d 719, 724 (10th Cir. 1984).

Although admission of "other acts" evidence carries with it the potential to confuse the ultimate issues to be determined by the jury and to unfairly prejudice a party, we note that under Rule 404(b) the trial court "has the duty to balance the probative force of the evidence against any possible prejudicial effect it might have on the jury." *Kerr*, 735 F.2d at 286. Moreover, the balance struck by the trial court will be overturned on review only on a finding of abuse of discretion.

Our review of the record indicates that the district court carefully considered the evidence concerning the larger plan and admitted it to show knowledge, intent and absence of mistake on the part of Clayton. The record also discloses that the trial court limited in some respects detailed testimony concerning the larger plan. Accordingly, we hold that the trial court did not abuse its discretion in striking the balance that it did.

In addition, the record reflects that early in the trial, Clayton brought up the subject of a cautionary instruction. In response, the court requested Clayton to prepare such an instruction and offered to hear argument on the content of the instruction and when it should be given. From Clayton's subsequent silence on the issue, we can only conclude that it decided, as a tactical matter, to request the court to give the cautionary instruction only

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[5] In addition, we also considered a challenge to the district court's admission of two prior consent decrees entered against the trader.

with the other instructions at the close of the case.[6] In any event, we cannot say that the trial court's failure to give, sua sponte, a cautionary instruction during the course of the proceedings constituted an abuse of discretion.

IV. CONSTITUTIONAL CHALLENGE

Finally, Clayton argues that the punitive damages award violates the due process and equal protection clauses of the United States Constitution. Specifically, it contends that jury instruction number four violated its due process rights because it set forth a preponderance of the evidence standard as the

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[6] The record reflects the following exchange concerning the cautionary instruction:

> [Counsel for Clayton]: You advised us earlier, I believe it was in connection with the arguments on the motion in limine, that you would give to the jury a cautionary instruction dealing with the evidence of activities relating to the other customers, customers other than Mr. Jordan.
>
> We've looked at that Eighth Circuit case that has, I believe in the footnote, a cautionary instruction that was given in that case. If you wish, we would be willing to draft a proposed cautionary instruction for your review, or I guess we are asking whether you have drafted such an instruction, or just what we should do on that.
>
> I think we are getting more and more into that type of evidence. We assumed we would not ask for that until right before the other customers started coming on the stand. But we are already getting into evidence about other customers.
>
> I think Ms. LaQuey will undoubtedly testify about other customer's accounts, and so it may be that we would be requesting that fairly quickly.
>
> The Court: What I propose you do * * * is prepare the form of instruction that you wish that I give, show that to [plaintiff's counsel], let them look at it, and then if there is some disagreement about either the instruction or when it should be given, we can take it up at one of our numerous times away from the jury.

Transcript at 333-34.

burden of proof for awarding punitive damages. Clayton objected to the instruction at trial and challenges the instruction on appeal on the ground that the punitive nature of the award requires proof beyond a reasonable doubt. In addition, Clayton contends that admission of evidence as to its net worth violated the equal protection clause because the evidence irrationally implies it would be more appropriate to punish Clayton than another defendant under similar circumstances who had a lesser net worth.

In essence, we understand Clayton's contentions to be grounded on *Bankers Life and Casualty Co. v. Crenshaw*, __ U.S. __, 56 U.S.L.W. 4418 (May 16, 1988). At the time Clayton filed its brief in this case, the Supreme Court had noted probable jurisdiction but had not yet decided *Bankers Life*.

In *Bankers Life*, the petitioner insurance company sought to challenge a jury verdict awarding the appellee 1.6 million dollars in punitive damages. The insurance company contended that the award violated the Eighth Amendment's prohibition of excessive fines. In addition, it claimed that the award violated the due process and the contract clauses. The Supreme Court, however, declined to reach the issues, concluding that they were not raised and passed upon in the prior state court proceedings. 56 U.S.L.W. at 4420.

Initially, we note that the equal protection claim raised by Clayton was not raised by the appellant in *Bankers Life*. Moreover, although the appellant in *Bankers Life* claimed that the punitive award violated the due process clause, the Supreme Court characterized the chief issue raised in the case as "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases." *Id.* Thus, it is clear that the constitutional challenge to the punitive damages awarded in this case is very different from the challenge the petitioners sought to raise in *Bankers Life*.

More importantly, however, Clayton cites no case other than *Bankers Life* in support of its constitutional claims. Contrary to Clayton's due process claim, punitive damages are civil in nature and are therefore not required by the Constitution to be subject to proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 371-72 (1970). (Harlan J. concurring).

Similarly, Clayton's equal protection challenge is without merit. Clayton argues that admission of evidence of its net worth improperly suggested it would be more appropriate to punish Clayton than to punish a defendant with a lesser net worth. Yet, the evidence was not admitted on the issue of whether to impose punitive damages, nor was the jury instructed to consider such evidence in that determination. Rather, the jury was instructed to award punitive damages only if it found in favor of Jordan on the compensatory claim and if it found Clayton's conduct was malicious. *See* Jury Instruction No. 12. Thus, admission of the evidence did not violate Clayton's rights under the equal protection clause.

Accordingly, we affirm the judgment of the district court.

ROSS, Senior Circuit Judge, dissenting.

I respectfully dissent from the opinion of the panel majority and instead would reverse and remand the case to the district court with directions to order a remittitur of at least $300,000 of the $400,000 punitive damages award. A remittitur is appropriate in this case for at least two reasons. First, the record discloses that Clayton Brokerage Services Company (Clayton) was at most negligent in failing to supervise and investigate Martin Rachlin's activities. The degree of malice exhibited by Clayton does not justify the severity of the punitive damages levied against it.

Second, at a fifty to one ratio, the punitive damages award is so grossly excessive in relation to the actual damages that the

award represents a plain injustice. The punitive damage award imposed in this case does not exhibit the requisite correlation to the injury inflicted and the cause thereof. *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Cir. 1987).

Accordingly, I dissent from the majority opinion to the extent that it fails to find that the punitive damages award of $400,000 is excessive as a matter of law.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

DAVID T. JORDAN,
Plaintiff,

v.

CLAYTON BROKERAGE COMPANY
OF ST. LOUIS, INC.,
Defendant

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986, AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND DENYING DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL

Defendant asserts 37 separate grounds for granting its motion pursuant to Rule 50, Federal Rules of Civil Procedure, for judgment notwithstanding the verdict or, in the alternative, its motion pursuant to Rule 59, Federal Rules of Civil Procedure, for a new trial.

Standards for Determining Motions for New Trial and Judgment Notwithstanding the Verdict

Despite the jury verdict in favor of plaintiff, judgment may be entered in favor of defendant if that is the only reasonable conclusion. *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967). A motion for judgment notwithstanding the verdict challenges the sufficiency of the evidence to support the jury's

verdict. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 194 (1940). In deciding whether to grant defendant's motion for judgment notwithstanding the verdict, the Court should consider the evidence in the light most favorable to plaintiffs, assume that all conflicts in the evidence were resolved by the jury in favor of plaintiff, assume as proved all facts which plaintiff's evidence tends to prove, and give plaintiff the benefit of all reasonable inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409 (1962); *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977). The Court may not consider the credibility of the witnesses or the weight of the evidence. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1105 (8th Cir. 1981). A motion for judgment notwithstanding the verdict should be granted only if the evidence, together with all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, would not allow a reasonable jury to find in favor of the non-moving party. *Tribble v. Westinghouse Elec. Corp,* 669 F.2d 1193, 1195-96 (8th Cir. 1982), *cert. denied,* 460 U.S. 1080, 103 S.Ct. 1767 (1983).

While a motion for judgment notwithstanding the verdict is addressed to the sufficiency of the evidence, a motion for a new trial invokes the discretion of the Court by asserting that the verdict was against the weight of the evidence or that for other reasons of law the trial was manifestly unjust. *Montgomery Ward & Co.*, 311 U.S. at 251, 61 S.Ct. at 194. The granting of a new trial rests within the discretion of the trial court. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972). A new trial should be ordered where the verdict was against the weight of the evidence or to prevent a miscarriage of justice. *Day v. Amax, Inc.*, 701 F.2d 1258, 1262 (8th Cir. 1983). A new trial should not be granted merely because the Court feels that another result was more reasonable. *Fireman's Fund Insurance Co.*, 466 F.2d at 186.

Application of These Standards to Defendant's Motions Judgment Notwithstanding the Verdict

Viewing the evidence in the light most favorable to the plaintiff and affording the plaintiff all reasonable inferences to be drawn from the evidence, a reasonable jury could have found in favor of the plaintiff. Therefore, defendant's motion for judgment notwithstanding the verdict is denied.

Motion for New Trial

Defendant argues that it should receive a new trial because 1) the verdict is excessive and contrary to the clear weight of the evidence; and 2) the excessive verdict resulted from erroneous admission of evidence relating to other customer accounts which were unrelated to plaintiff's account.

On November 24, 1986, the jury returned a verdict in favor of plaintiff and against defendant for actual damages in the amount of $7,923.50 on two counts submitted to it, i.e., plaintiff's claim for fraudulent misrepresentation under the Commodity Exchange Act, 7 U.S.C. §§ 1-24, and plaintiff's claim for breach of fiduciary duties under the common law of the state of Missouri. In addition to the actual damages awarded on the breach of fiduciary duties claim, the jury assessed punitive damages in the amount of $400,000. Defendant argues that the punitive damage award was excessive.

Because the excessiveness issue arises with respect to the state law claim, Missouri law governs. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 477 (8th Cir. 1977) (the damage award may not exceed "that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim."). *See also Vanskike v. Union Pacific R. Co.*, 725 F.2d 1146, 1150-51 (8th Cir. 1984).

In Missouri, "[g]ranting a new trial on the ground of excessiveness of the verdict is equivalent to granting a new trial on the

ground that the verdict is against the weight of the evidence. Both involve the power of the trial court to weigh the evidence." *Pisha v. Sears Roebuck & Company,* 496 S.W.2d 280, 284 (Mo. Ct. App. 1973). *See also Mitchell v. Pla-Mor, Inc.,* 361 Mo. 946, 237 S.W.2d 189, 191 (Mo. 1951); *Wisner v. S.S. Kresge Company,* 465 S.W.2d 666, 670 (Mo. Ct. App. 1971).

Punitive damages are awarded in Missouri for the purpose of punishing the wrongdoing defendant and also for the purpose of deterring defendant and others from similar wrongful conduct in the future. *Wisner,* 465 S.W.2d at 669.

> The question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury. In exercising such discretion and arriving at its conclusions, the jury must, of necessity, consider all of the facts and circumstances surrounding the incident and the party to the cause.

Id. (citations omitted).

In *State ex rel. St. Joseph Belt Ry. Co. v. Shain,* 341 Mo. 733, 108 S.W.2d 351 (Mo. 1937), the Court quashed its writ of certiorari to the Kansas City Court of Appeals thereby letting stand the lower court opinion that $4,000 punitive damages was not disproportionate to the actual damage award of $1. The Supreme Court quoted with approval the following from the opinion of the Kansas City Court of Appeals:

> *While it may be true that ordinarily a verdict for punitive damages should not be altogether disproportionate to the amount of actual damages returned,* yet in this case, the verdict for actual damages of $1 only was returned under the instructions of the court, for the reason of plaintiff's inability to introduce competent evidence of greater damages; and therefore the actual damages assessed furnish no proper guide for the amount of the punitive damages to be

> returned. Especially is this so as there is ample evidence in the record justifying a liberal award of punitive damages, and the inferences therefrom should not be limited and restricted by an arbitrary assessment of actual damages.

Shain, 108 S.W.2d at 365 (emphasis added).

In later cases, Missouri courts have cited *Shain* for the proposition that the punitive damages awarded must have some reasonable relation to the injury inflicted on the plaintiff. *See, e.g., Wisner*, 465 S.W.2d at 669 and *Holcroft v. Missouri-Kansas-Texas R. Co.*, 607 S.W.2d 158, 163 (Mo. Ct. App. 1980). "The general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation*." *Wheeler v. Community Federal Savings & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) (emphasis in original).

Based on the foregoing, Missouri does not require a direct proportional relationship between the actual damages awarded and the amount of punitive damages. However, Missouri does require that there be "some reasonable" relationship between the injury inflicted on the plaintiff and the amount of punitive damages.

In determining whether $400,000 is "altogether disproportionate" to the injury inflicted on the plaintiff:

> [A] review of the many cases awarding exemplary damages discloses that a hard and fast rule for the measuring of such damages cannot be declared. Each case turns more or less upon its own peculiar facts. The character and standing of the parties, the malice with which the act was done, and the financial condition of the defendant are elements which should be taken into consideration in awarding damages of this character [citation omitted], and the amount may be

> such as would serve to deter the occurrence of like acts in the future.

Wheeler, 702 S.W.2d at 87 (quoting *Sperry v. Hurd*, 267 Mo. 628, 185 S.W. 170, 174 (1916)).

The amount of punitive damages necessary to punish and deter cannot be precisely measured.

> Necessarily, the amount of punitive damages to effect punishment and determent can not be measured with mathematical preciseness. But this does not mean that juries have carte blanche in awarding punitive damages. Attendant circumstances, including mitigating as well as aggravating circumstances, must be taken into consideration, and the amount must be equated to the degree of malice, criminality or contumely characterizing the actor's conduct for which punishment or determent is deemed necessary.

Pisha, 496 S.W.2d at 284-85.

The financial worth of the defendant is an important factor for the jury to consider in arriving at an approximate punitive damage award. "Punitive damages have often been referred to as 'smart' money and it takes only slight consideration to realize that an amount of damages which might 'smart' one defendant might be entirely inconsequential to another." *Wisner*, 465 S.W.2d at 669-70.

Here, the jury could have concluded reasonably that defendant placed Martin Rachlin in a position where plaintiff was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence plaintiff placed in him resulting in substantial financial harm to plaintiff and substantial financial gain to Rachlin and defendant; that defendant failed to supervise in any meaningful way Rachlin's handling of plaintiff's account; that even when complaints about Rachlin were received, defendant failed to investigate adequately;

that defendant ignored information it had that Rachlin was violating defendant's regulations; and that because of defendant's substantial net worth, a punitive damage award of $400,000 was necessary to deter similar behavior by defendant in the future. As in *Shain,* the actual damages recoverable were limited and probably do not reflect completely the injury inflicted on plaintiff. Therefore, affording due deference to the jury's determination, the $400,000 punitive damage award bears a rational relationship to the injury inflicted; it is not "altogether disproportionate" to the injury inflicted on plaintiff. Accordingly, I will deny defendant's request that plaintiff be ordered to accept a lower damage award or face a new trial.

Defendant's argument that the punitive damages awarded were so large as to indicate an improper motive on the jury's part requires that defendant demonstrate some error occurred during the course of the trial that caused the jury to ignore the evidence and instructions. *Parks v. Consolidated Aluminum Co.,* 679 S.W.2d 348, 352 (Mo. Ct. App. 1984). Defendant argues that evidence about the complaints of other customers of Martin Rachlin and evidence about the manner in which Rachlin handled other customer's accounts were irrelevant and unfairly prejudiced and confused the jury. Defendant argues that the cumulative effect of plaintiff's other bad act evidence caused the jury to award $400,000 in punitive damages.

I was concerned during the trial that if plaintiff called all of the witnesses scheduled, the cumulative effect of plaintiff's "other account" evidence might deprive defendant of a fair trial. However, now that the trial is completed, I do not believe that defendant was deprived of a fair trial as a result of the admission of that evidence. Plaintiff's scaled down presentation of evidence about other accounts plus the instructions to the jury avoided the unfairness of excessive other acts evidence. Therefore, defendant has failed to show that anything happened during the trial that would have caused the jury to ignore the evidence and the instructions in awarding punitive damages.

For the foregoing reasons, it is hereby ORDERED that defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial are denied.

/s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri

February 5, 1987.

APPENDIX F

1. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend. XIV.

2. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U. S. CONST. amend. V.

3. Sections 4b and 4c of the Commodity Exchange Act (7 U.S.C. §§ 6b, 6c) provide in pertinent part:

> It shall be unlawful (1) for any member of a contract market, . . . in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made or to be made for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive . . . such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; . . .

* * *

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped or received in interstate commerce for the fulfillment thereof

(A) if such transaction is, is of the character of, or is commonly known to the trade as a "wash sale," "cross trade," or "accommodation trade," or is a fictitious sale;

(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with

board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

4. Section 14(a) of the Commodity Exchange Act provides in pertinent part:

> Any person complaining of any violation of any provision of this Act . . . by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation.

7 U.S.C. S 18(a).

5. Section 22 of the Commodity Exchange Act provides in pertinent part:

> (a)(1) Any person . . . who violates this Act or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions referred to in clauses (A) through (D) of this paragraph and caused by such violation. . . .

7 U.S.C. S 25.